IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1933

UNITED STATES OF AMERICA,
Appellant,

vs.

THE CITIZENS AND SOUTHERN NATIONAL BANK, ET AL.,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees move that the judgment of the district court (J.S. 1a-69a;[1] 372 F. Supp. 616) be affirmed.

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[1] The abbreviations used are as follows: the Jurisdictional Statement is cited as "J.S.," the trial transcript as "Tr.," the government's exhibits as "GX," and appellees' exhibits as "DX." Citations to "Economic Report" refer to the written testimony of appellees' economic expert witness.

STATEMENT

The Citizens and Southern National Bank, the principal defendant below and appellee here, is the largest bank in Atlanta. It has achieved this position through internal expansion (that is, by outcompeting the other banks in Atlanta) rather than through mergers[2] (that is, by acquiring competitors), and it has done so in the face of state banking laws that seek to limit expansion through internal growth. Properly viewed, the present case is not a merger case at all—still less is it a price-fixing case. It is the outgrowth of C&S's continuing efforts to overcome the limitations placed by Georgia law on *de novo* branching.

C&S's position of leadership in Atlanta banking is remarkable given the competitive handicap under which Georgia law has placed it in relation to other Atlanta banks. C&S's home office, unlike the home offices of the other major Atlanta banks, is located in another city. C&S entered the Atlanta market at a time when Georgia law permitted state-wide branching (J.S. 9a). But in 1929 the state enacted a law forbidding the establishment of any new branches outside of the city in which a bank's home office was located (J.S. 8a). This law—an example of the type of inflexible limitation on *de novo* branching discussed critically in this Court's recent opinion in *United States v. Marine Bancorporation, Inc.* (No. 73-38, slip opinion, p. 8, n. 8, June 26, 1974)—might have prevented the further growth of C&S in Atlanta but for the existence of another

[2] Only about 12 percent of C&S's total demand deposits in the Atlanta area are accounted for by branches that it acquired rather than created *de novo* (GX 78); only 5 of its 49 offices in the Atlanta area were acquired (GX 4). (These computations exclude the pre-1927 acquisitions by which C&S, whose home office is in Savannah, first obtained a foothold in the Atlanta market.) All of C&S's acquisitions, moreover, have been of banks that were experiencing serious business difficulties (Tr. 511-12; DX 267, pp. 16, 18).

method of internal expansion that was not affected by the 1929 law. C&S could form a bank holding company and could then organize new banks that would be wholly owned subsidiaries of the holding company (J.S. 9a-10a). But eventually the state decided to limit this method of expansion as well. A law passed in 1956 forbade a bank holding company to own more than 15 percent of the stock of another bank; in 1960 the law was amended to reduce the maximum amount of stock ownership to five percent (J.S. 8a).

The background to the five proposed acquisitions challenged in this case is a series of transactions during the period 1959-1969 by which C&S attempted to continue to grow internally in metropolitan Atlanta (beyond the corporate city limits) in the face of the severe limitations that the law of 1929 imposed on *de novo* branching directly and that the laws of 1956 and 1960 imposed on *de novo* branching through the holding company device. Since the late 1950's, C&S, like other retail businesses located in large cities, had watched as its customers moved out of the city—its market area—and into the suburbs (Tr. 513-15, 530; Economic Report, vol. 1, pp. 7-8). C&S could not hope to retain these customers' business unless it established branches in the suburbs, for most suburban residents will not drive into the city to conduct their banking business (Tr. 515). C&S's need to follow its customers into the suburbs was especially acute because C&S has always emphasized the retail side of the banking business—the catering to the needs of individuals and small firms, both as depositors and as borrowers (Tr. 523; Economic Report, vol. 1, p. 120). As a result of the 1929, 1956, and 1960 banking laws to which we have referred, C&S could not establish new branches in the suburbs either directly or through subsidiaries; but it hit upon a method of creating, in effect, new suburban branches without running afoul of Georgia law.

The method (described in detail in the district court's opinion, at J.S. 42a-55a) involved organizing ("sponsoring") a new

bank in the area where C&S wanted to have a branch office, placing the bank's stock (above the five percent that C&S was permitted to own directly) in friendly hands, and staffing the bank with C&S personnel and giving it the use of the C&S name, logo, and methods of doing business. All of this was done in the expectation that if and when the state limitations on branching were relaxed the banks would be formally acquired by C&S (J.S. 10a-11a, 42a-44a, 49a-50a).[3] Pending formal acquisition, the "five percent banks," as the newly formed banks were called, while they were perfectly free to adopt divergent policies if they wanted to, could—and for obvious reasons of business advantage did—function in a manner much like C&S's branches—so much so that the banking public regarded them as such (J.S. 54a; Tr. 903, 971; Economic Report, vol. 1, pp. 112, 119). By thus conforming their business policies to those of C&S, the five percent banks were able to exploit the goodwill associated with the C&S name and to utilize the methods of banking that had made C&S the largest bank in Atlanta.

In 1971 Georgia law was changed to permit banks to branch throughout the counties in which they had offices.[4] C&S was now free to acquire the five percent banks. After the Federal Deposit Insurance Corporation approved the proposed acquisitions (GX 33B, GX 33C), the Department of Justice brought this action, alleging that the acquisitions would violate section 7 of the Clayton Act. The complaint also challenged the existing relationships between C&S and the banks as violative

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[3] In two earlier transactions, C&S had acquired banks that it had organized and operated in the same manner as it did those involved in this case. The Department of Justice did not challenge either acquisition (Tr. 657-59, 672-73).

[4] The law had been changed in 1960 to permit branching throughout the city in which a bank had an office (J.S. 8a), but this change of law was irrelevant to C&S's desire to establish suburban offices.

of section 1 of the Sherman Act. C&S had entered into similar relationships with some already established, rather than newly formed, banks. Its relationship with one of these—The Citizens and Southern Bank of Tucker—was also challenged in the complaint as a violation of section 1 of the Sherman Act. The Tucker bank is not involved in the section 7 phase of the case, since the FDIC disapproved C&S's proposed acquisition of Tucker (GX 33D).

DISCUSSION

I. Introduction

This case is a sport in the antitrust-banking field.[5]

(1) It arises only because of a peculiarity of Georgia banking law, no longer in force, that prevented C&S from opening new suburban branches, thereby forcing it to adopt the indirect method challenged in this case. Had it not been for this now-repealed provision of Georgia law, C&S would have owned the five percent banks from the outset and this case would not have been brought; the Department concedes, as it must, that for C&S to create new branches in the Atlanta suburbs, and to furnish them with information about service charges or credit terms (or even to tell them what prices to charge), would raise no issue of antitrust illegality.

(2) Were it not for a loophole in the Federal Bank Holding Company Act, plugged in 1970, the relationship between C&S and the five percent banks would clearly have been subject to the primary jurisdiction of the Federal Reserve Board, and the principal issues concerning the propriety of that relationship might never have become the subject of an antitrust suit.[6]

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[5] The Jurisdictional Statement implicitly concedes this. The only reference to either the intrinsic or the precedential significance of the case is a boilerplate recital that the questions presented "are of substantial importance to the banking community and to the administration of the antitrust laws." (J.S. 16.)

[6] Under the 1970 amendments to the Federal Bank Holding Company Act, a bank over which another bank has a "controlling influence" is deemed a "subsidiary" of that bank (12 U.S.C. § 1841 (d)), and the Federal Reserve Board must approve their relationship (see § 1842(a)). This provision of the 1970 amendments is inapplicable to relationships commenced prior to 1970; that is why the approval of the Federal Reserve Board did not have to be and was not sought when C&S sponsored each of the five percent banks. With respect to post-1970 relationships, the required Board proceed-

(3) Although the Department of Justice has challenged other proposed mergers between previously affiliated banks, in no other case has it challenged the previous affiliation as a violation of the Sherman Act, and we shall see that the Department's challenge to the proposed mergers in the present case depends on the Sherman Act count.

In light of these considerations, the case does not merit plenary review by this Court—especially since, thanks to the Expediting Act, the case comes to this Court without the benefit of intermediate appellate review, and at a time when the Court's docket has become extremely heavy and burdensome.[7] At all events, the decision below is clearly correct; further briefing and argument are not required to dispose of the appeal. A controlling consideration is that the dispositive issues in the case are factual and the Department does not contend that any of the district court's factfindings are clearly erroneous.[8]

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ing would provide an important, and arguably controlling, input into the determinations of whether an informal relationship between two banks so united them that a formal merger would not alter the substance of their relationship and whether the informal relationship represented an improper restriction of competition—the two issues in this case.

[7] For a recent study of the Court's workload problem, and a review of the earlier literature, see Gerhard Casper & Richard A. Posner, *A Study of the Supreme Court's Caseload*, 3 J. Legal Studies 339 (1974).

[8] The absence from the Jurisdictional Statement of any reference to the clearly-erroneous standard, though it is plain that the Department is seeking mainly to overturn the district court's factfindings, suggests that the Department has not yet taken to heart this Court's admonition in *United States v. General Dynamics Corp.*, No. 72-402, March 19, 1974, that: "The findings and conclusions of the District Court are, of course, governed by the 'clearly erroneous' standard of Fed. Rule Civ. Proc. 52(a) just as fully on direct appeal to this Court as when a civil case is being reviewed by a court of appeals." (Slip opinion, p. 21.)

It should be noted that the district court in this case did not adopt proposed findings submitted by the defendants—the practice criticized

II. The Department Failed to Prove That C&S's Proposed Acquisition of the Five Percent Banks Was Likely to Lessen Competition Substantially.

It is undisputed that from the day the five percent banks opened their doors to the present day only a negligible amount of competition between these banks and C&S occurred (J.S. 11a, 64a; Tr. 533-34; GX 33B, GX 33C). The five percent banks were created by C&S and they considered themselves extensions rather than competitors of C&S (Tr. 533, 601, 783). How, then, could the acquisition of these banks by C&S—a mere formalization of the existing relationships—affect the amount or vigor of competition in the relevant market? The answer that the government offered at trial was that, if the acquisitions were prevented, the five percent banks would eventually separate themselves from the C&S system and become substantial independent competitors. This contention framed a precise factual issue for the district court to resolve, an issue upon which the section 7 charge turned: was it likely that, if not acquired by C&S, the five percent banks would within some reasonable period of time break away from C&S and begin to compete with it? The district court, like the FDIC before it, found the answer to this factual question to be "no" (J.S. 65a). Since the Jurisdictional Statement does not challenge this finding as clearly erroneous, the section 7 appeal must fail.

In this Court, the Department, trying to convert a factual into a legal issue, seeks a rule that unless the parties to a pro-

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in *United States v. Marine Bancorporation, Inc., supra,* slip opinion, pp. 11-12, n. 13, where the Court nonetheless affirmed. The district court prepared its own findings. It should also be noted that the Federal Deposit Insurance Corporation, the banking agency that approved the proposed acquisitions challenged in this case, is extremely conscientious in weighing the competitive effects of a proposed acquisition—so much so that in one recent case it was rebuked for applying a stricter standard than the antitrust laws themselves. See *Washington Mutual Savings Bank v. Federal Deposit Insurance Corporation,* 482 F.2d 459 (9th Cir. 1973).

posed merger were under common ownership prior to the merger, they should be treated as if they were wholly unrelated and fully competitive entities, regardless of the actual facts of their relationship (see J.S. 28-29). This Court rejected that approach in *United States v. Trans Texas Bancorporation*, 412 U.S. 946 (1973), affirming per curiam 1972 Trade Cases ¶ 74,257 (W.D. Tex. 1972), which the government vainly tries to distinguish. In *Trans Texas* the government had challenged a proposed merger among several banks in which members of an informal group of 49 individuals were majority stockholders. The group was not a single entity in any formal legal sense—no contractual or other formal obligations united its members. The only cement of the relationship was loyalty to an individual who at the time of trial was 75 years old.[9] The banks both held themselves out to the public as separate entities and in fact competed among themselves.[10] Nonetheless the district court found that probability that the ties among the banks would dissolve, and hence that formal merger of the banks would result in a future reduction in competition, was too remote to justify the conclusion that the merger would violate section 7. This Court affirmed. It thereby rejected the proposition urged by the government in the present case that so long as the parties to a proposed merger have the formal legal capacity to compete, the competive effects of the merger are to be analyzed on the

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[9] The Department's statement that the banks involved in *Trans Texas* "never had the capacity to make independent decisions" (J.S. 28) is a reversal of its position in its Jurisdictional Statement in *Trans Texas*. There, the Department argued that "the banks have been independent entities which made their own decisions and significantly competed with each other." (P. 17.) The Department pointed out that the members of the group "were not bound together by any written agreement; they did not claim to have any legally binding arrangement among them to vote in concert; they never held a formal meeting; and they did not act in concert to control the competitive efforts of the banks." (P. 18, record citations omitted.)

[10] For examples, see the Jurisdictional Statement in *Trans Texas*, pp. 8, 22.

fictitious premise that the parties are fully independent competitors in fact.

The government's proposition is also in conflict with this Court's recent decisions in *United States v. General Dynamics Corp., supra,* and *United States v. Marine Bancorporation, supra.* Those decisions hold that statistics showing that a merger would substantially increase concentration in the relevant market establish a prima facie case of a section 7 violation, but that the defendant may rebut by showing that in the particular circumstances of the case the statistics lack their usual significance in predicting adverse competitive consequences. See, *e.g., Marine* slip opinion, p. 27. The defendant's burden on rebuttal was carried in *General Dynamics* by proof that the acquired firm's mineral reserves were too depleted to enable it to compete in the future on the same scale that it had done in the past, in *Marine* by proof that *de novo* entry by the acquiring firm into the market of the acquired firm would not have enabled the former to compete effectively in that market due to state-law limitations on branching from a branch, and in *Trans Texas* and in the present case by proof that the merger would be in the nature of an internal reorganization that altered the form rather than the substance of the competitive relationships among the parties to the merger.

To require the trier of facts to ignore the elaborate and effective, although informal, linkages between C&S and the five percent banks because those linkages do not amount to formal stock control under the law of corporations would be a return to the mechanical antitrust jurisprudence repudiated in the recent merger decisions. These linkages profoundly affect the competitive significance to be attached to the fact—the only fact on which the government relies to show that the challenged acquisitions are anticompetitive—that the acquisitions would increase the concentration ratio, and the district court was entitled under this Court's decisions to consider them. The major

assets of the five percent banks are the goodwill associated with the C&S name and the proved methods of successful banking available to the five percent banks as participants in the C&S system. It would be unrealistic to expect them to forfeit these assets by voluntarily separating themselves from the C&S system—only once before has a bank done this, and it was under circumstances sharply different from those involved in this case.[11] It would be equally unrealistic to expect C&S to expel the banks from the C&S system and thereby compei them to operate as independent competitors. If it did so, it would have no offices in the Atlanta suburbs—we noted earlier how badly it needed them—unless it were to open new branches there. But any new branches would be competing with the former five percent banks. Thus, the effect of separating them from C&S would turn out to be the creation of new competition for C&S, which is something business firms are loath to do. Furthermore, although state law no longer interposes an absolute bar to C&S's opening new branches in the suburban areas served by the five percent banks, the banking authorities have and exercise broad discretion to deny applications for permission to branch (see GX 33A, GX 33E). There is no assurance that having expelled the five percent banks from the C&S system C&S would be permitted to establish branches in their service areas; those banks would protest vigorously against C&S's opening new branches in competition with them in the precarious state in which they would find themselves if forced to operate as independent competitors. Such uncertainty as to whether C&S

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[11] The "breakaway" was the Stone Mountain bank. Unlike the five banks proposed to be acquired here, it had a pre-existing independent identity, and other distinguishing features (Tr. 534A-39, 553-54, 561, 597-99, 626, 638-43). The government's statement that Stone Mountain was "organized . . . with C&S's assistance" (J.S. 5) is completely—we hope not intentionally—misleading. The only "assistance" consisted of referring the organizers of Stone Mountain to an ex-employee of C&S for *his* assistance (Tr. 535). C&S did not sponsor Stone Mountain as it did the five banks that it is attempting to acquire.

would be allowed to establish branches in these areas is a potent deterrent against C&S's expelling the five percent banks, lest it find itself wholly excluded from the suburban markets (J.S. 65a).

It is *possible* that the five percent banks might some day separate from C&S and become independent competitive factors. But that is a "mere possibility," which the district court was entitled to disregard. *United States v. General Dynamics, supra,* slip opinion, p. 22.

The government contends, finally, that it is no defense to a challenged merger that the firms previously agreed not to compete with each other, in violation of section 1 of the Sherman Act. There can be no quarrel with the general proposition. But its basic premise—that section 1 has been violated—has not been established here, as we shall soon see. In any event, the proposition has no relevance to the circumstances of this case. If—this seems to be the sort of case the government is thinking of—General Motors and Ford wanted to merge, and anticipating a legal challenge to the merger, agreed not to compete for a period of time preceding the public announcement of the merger, their agreement would not shield the merger from a challenge under section 7 of the Clayton Act. Nothing remotely like that hypothetical case is involved here. The five percent banks that C&S proposes to acquire were not previously independent competitors. They were created by C&S, and they have at all times operated as if they were branches of C&S.[12] Had they been

[12] Only the Tucker bank had an independent existence prior to becoming a five percent bank, and it is not involved in the section 7 aspect of the case because the FDIC denied C&S's application to acquire it. The Jurisdictional Statement implies, perhaps inadvertently but in any event incorrectly, that there was some period during which the five percent banks were independent competitive factors. It states, for example, that "soon" after their creation the banks began to behave as if they were branches of C&S (J.S. 5). The district court found that the relationships between the five percent

formal branches of C&S from the outset, no antitrust question would have arisen; and they would have been formal branches of C&S from the beginning, but for the provisions of Georgia banking law. The absence of competition between C&S and the banks it proposes to acquire is not the result of a scheme to defeat a legal challenge to an eventual merger; it is the result of the fact that these banks were created, and from the outset operated, as the nearest thing to branch offices that state law permitted, in order that C&S could enter the suburban Atlanta banking markets. The establishment of the five percent banks by C&S was procompetitive, and the district court found that consummation of the proposed acquisitions will also be procompetitive (J.S. 68a).

III. The Department Failed to Prove a *Per Se* Violation of Section 1 of the Sherman Act.

The section 1 count in the complaint is an afterthought.[13] It was inserted in order to buttress the government's section 7 case against the argument that the five percent banks had never been, and were unlikely ever to become, independent competitive factors. At all events, the section 1 appeal must fail for two independent reasons: (1) the government failed to prove an agreement not to compete; (2) even if such an agreement had been proved, it would not have been a *per se* violation of

banks and C&S on which the section 1 count rests existed without change from the formation of the five per cent banks that C&S proposes to acquire (J.S. 11a; Tr. 533, 600-01). This finding is not challenged.

[13] In the reports that the Department submitted to the banking agencies, as required by the Bank Merger Act, when the acquisitions were first proposed, it made no reference to any Sherman Act problems (GX 36, GX 37, GX 38)—even though its major contention now is that the acquisitions cannot lawfully be approved because of an antecedent violation of that Act.

section 1—and the government in this case proceeded exclusively on a *per se* theory of violation.

(1) It is perfectly lawful under the Sherman Act for two firms in the same market not to compete with each other. It is only agreements not to compete that violate the Act. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954). The two firms might be owned by different members of the same family who might decide—independently, without agreement—to compete against the other firms in the market rather than against each other. A small firm might decide that it could make a good profit charging the same price for its product as its largest competitors, and if it did so rather than cut prices, this would be a unilateral decision not to compete in price with that competitor. In neither of these examples would there be a violation of the Sherman Act. This is the same kind of case. The management of the five percent banks *unilaterally* chose to compete as C&S banks. Their choice was hardly surprising or unnatural in the circumstances. There was considerable overlap in the ownership of the common stock of the five percent banks and of C&S; the five percent banks were using C&S's name, logo, and business methods; the public regarded them as C&S banks; and C&S had much greater knowledge of competitive prices and methods, and of market conditions generally, than the five percent banks. In these circumstances, it was natural that the management of the five percent banks would decide not to compete with C&S and their failure to compete therefore gives rise to no inference that there was *an agreement* not to compete. The addition of the five banks to their market areas, competing there as C&S banks, was, without dispute, procompetitive.

There were, to be sure, *agreements* that C&S would own five percent of the common stock of the banks and that C&S would allow them to use the C&S name and methods and would render them advice and assistance. But such agreements, while they

may in fact reduce the likelihood or amount of competition among the parties to them, are not agreements not to compete, and they are not *per se* violations of the Sherman Act. (The government in this case proceeded on a *per se* theory of illegality; it offered no evidence that the challenged practices in fact restricted competition unreasonably.)

This fundamental distinction is illustrated by *United States v. Topco Associates*. 405 U.S. 596 (1972), where competing retail grocers agreed to purchase products jointly for resale under a common trademark, and to cooperate in other ways. These agreements, which may in fact have reduced the intensity of competition among the parties, were not even challenged. Indeed, these agreements, like those in this case, fit the classic definition of a restraint ancillary to a legitimate business objective, and such a restraint is reasonable and not violative of the Sherman Act. *Addyston Pipe and Steel Company v. United States*, 85 F. 271 (6th Cir. 1898) (Taft, J.), *aff'd*, 175 U.S. 211 (1899). But the retail grocers in *Topco* had gone further and agreed not to sell in each other's territories—and it was this agreement that the Court held violated section 1 of the Sherman Act. In the present case there were many elements of cooperation and association between the five percent banks and C&S, but there was no evidence of a further agreement not to compete. The district court found as a fact that the evidence failed to show "the existence of any agreement not to compete" (J.S. 24a). This finding, which has not been challenged as clearly erroneous, is binding on this Court and requires that the judgment of the district court dismissing the section 1 count of the complaint be affirmed.

The section 1 charge in this case has a tortured history. The complaint alleged that the defendants had violated section 1 by maintaining "a close working relationship" (complaint, ¶¶ 34, 38-44)—an absurd theory of *per se* illegality, not mentioned in the Jurisdictional Statement. At trial, the evidence

most favorable to the government showed merely that C&S circulated to the five percent banks the same information regarding service charges and other business practices that it distributed to its branch managers. It was understood—and ordinarily stated on the copies sent to the five percent banks—that so far as those banks were concerned the circulars were for information only.[14] The banks were perfectly free to deviate from the suggestions in the circulars, and sometimes did. Mere dissemination of price information is not a *per se* violation of the Sherman Act—if it were, sellers would be guilty of violating the Act every time they announced a price change publicly! In *United States v. Container Corporation of America*, 393 U.S. 333 (1969), the leading case on information exchanges, this Court found an *agreement* among competing firms to exchange information under *circumstances* where the probable effect of the exchanges was to stabilize the market price. Both elements are missing here. There was no agreement to exchange information—C&S distributed information about its prices to the five percent banks but the latter did not agree to furnish information to C&S in return, nor did they do so.[15]

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[14] The district court found—and once again its finding is unchallenged—that "there is no suggestion that any advice as to rates amounts to more than an expert appraisal of a market situation from the point of view of a lending institution—a type of opinion to which a lending institution would naturally be expected to pay great attention." (J.S. 24a.)

[15] The Court inferred agreement in *Container* from the exchange of information, reasoning that it was furnished on the implied condition that the recipient would furnish like information in return when the occasion arose. See 393 U.S. at 335. Nothing of that sort was involved here; the information moved in one direction only. The district court expressly found that there was no agreement, stating: "There is no evidence of record to conclude that the utilization by the five percent defendant banks of the services or information received by them from C&S National or C&S Holding was a result of any tacit or explicit combinations rather than the natural deference of the recipient to information from one with greater expertise or better sources." (J.S. 29a.) This finding is not challenged as clearly erroneous.

And the government made no effort in the present case to establish the likelihood that the information dissemination had affected or was likely to affect the market price of banking services. The district court found that it had no effect (J.S. 27a-28a), and its finding, once again, is not challenged.

At trial, the government's theory of the Sherman Act violation was apparently that of the *Container* decision (see Plaintiff's Post-Trial Brief, pp. 12, 58-61; Plaintiff's Proposed Findings of Fact, p. 64). That theory has now been jettisoned[16] and the Jurisdictional Statement characterizes the unlawful conduct as an agreement on the part of the five percent banks to submit to the direction of C&S (*e.g.*, J.S. 24, n. 18)—to become its "vassals" (J.S. 17). No such agreement was either alleged or proved. The banks never agreed to submit to C&S's direction; they never took orders from C&S. What they did do —for obvious reasons stemming from the circumstances under which the banks were created—was unilaterally to conform their business practices to those of C&S.

(2) Even if an agreement to submit to the direction of C&S *had* been proved—we stress that it was not—it would not be a *per se* violation of the Sherman Act. Any agreement creating a subsidiary could be characterized as an agreement by which the subsidiary corporation has submitted to the direction of the parent, but the government does not assert that such an agreement would be a *per se* violation of the Act. The relationship between C&S and the five percent banks was merely a substitute for the formal parent-subsidiary or bank-branch relationships

[16] *Container* is not even cited in support of the government's Sherman Act theory, except for the peripheral (and uncontested) point that freedom to withdraw from a price-fixing agreement is no defense to a charge of illegal price-fixing. The point here is that there was no agreement. The only authority that the government offers for its theory of Sherman Act illegality is *Topco* (discussed in the text above) and *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958)—a tying case without any conceivable relevance to the present case.

that state law forbade; it was an attempt to establish branch offices by the only method permissible under the applicable state law. The Department would have applauded C&S's formal establishment of branches in the Atlanta suburbs as new entry that increased banking competition in those markets. Yet it treats their informal establishment as the equivalent of a price-fixing conspiracy. No authority is cited, and none exists, for using the *per se* concept to thwart the fundamental objective of antitrust policy in the banking industry.[17]

IV. **There Is an Irreconcilable Conflict Between the Government's Position Here and in Marine Bancorporation.**

In the *Marine* case, *supra,* the government proposed an ingenious method by which banks could branch *de novo* into a new market, and thereby increase the amount of competition in that market, despite state-law limitations on *de novo* branching. The method it suggested consists of sponsoring a new bank, placing its stock in friendly hands, and eventually acquiring the bank (see Brief for the United States in *Marine,* pp. 16-17, 24, 45-52). This is precisely the method by which C&S expanded into the Atlanta suburbs; that the government should accuse C&S of having thereby violated the Clayton and Sherman Acts suggests to us a profound confusion within the Antitrust Division.

When this inconsistency was pointed out by the Comptroller of the Currency in his brief in *Marine,* the government replied that the method of *de novo* branching adopted by C&S differed

[17] In the words of the district court: "The Government has relied upon a claimed per se illegality rather than unreasonableness of the specific practices involved and, for the reasons set forth above, the Court does not believe the evidence will support a finding that such practices in fact were unreasonable restraints of trade. Indeed, the Court is constrained to find that, balancing the evidence, such practices were in fact reasonable." (J.S. 28a.)

from that proposed by the government in two respects. First, since the acquiring bank in *Marine* was located in a different market from the acquired bank, it could have sponsored a new bank in the market of the acquired bank without fear that an eventual acquisition would be challenged as violative of section 7; in the present case the acquiring and acquired banks were alleged to be in the same market at the time of the proposed acquisitions. Second, the government's proposal in *Marine* had envisaged that the sponsoring bank would operate as a "*bona fide* independent" institution during the period preceding its acquisition by the sponsoring bank. (Reply Brief for the United States in *Marine*, pp. 1-2.)

These distinctions are utterly spurious. The government's main argument in *Marine* was that a large bank in one city could not lawfully acquire a major bank in another city within the same state. This implies that if a sponsored bank grew to be a major competitive factor before it could be acquired by the sponsoring bank (and in *Marine* state law required that a newly created bank be in operation for ten years before it could be acquired), the acquisition would violate section 7. Furthermore, the government made no effort in the present case to show that the acquiring and acquired banks had been in the same market at the time of the original sponsorship.[18]

With regard to the second suggested distinction, it is plain that the expression "*bona fide* independence" as used by the

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[18] The banks in fact were in separate markets at that time, when transportation between Atlanta and its suburbs was not so good as it is today and when C&S had fewer branches in parts of the city adjacent to the suburban areas involved in this case. When the five percent banks were organized, the Federal Reserve Board permitted officers of C&S to serve as directors of the five percent banks, despite the prohibition contained in Section 8 of the Clayton Act (15 U.S.C. § 19). The Board relied on the exception in Section 8 that permits interlocking directorates when the banks are not located in the same town or in contiguous towns (Tr. 593-94, 692-93). Even today, there is considerable question whether C&S and the five percent banks are in the same market (Tr. 985, 472-74; Economic Report, vol. 1, pp. 56-87).

government in *Marine* simply meant not so obvious an evasion of state law as to be unable to withstand attack by the state banking authorities.[19] It could not have meant competitive independence. With the stock of the sponsored bank to be owned by officers, directors, and other associates of the sponsoring bank, plus that bank itself to the extent permitted by state law (see Brief for the United States in *Marine*, pp. 16, 24), the sponsored bank could hardly be expected to compete vigorously against the sponsoring bank.[20] The government's brief quotes approvingly the description of one sponsored bank as a "satellite" of its sponsoring bank (Brief, *supra*, p. 16, n. 16)—a term hardly applicable to an independent competitor, although reasonably descriptive of a "vassal." Here are three other examples, drawn from portions of the record appendix in *Marine* and cited by the government to show how the acquiring bank could have used the sponsorship-followed-by-eventual-acquisition approach (Brief, *supra*, p. 16, n. 16, and p. 45, n. 36, of the meaning of "*bona fide* independence":

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[19] That is, the sponsored bank had to have enough of the trappings of independent operation to avoid violating the state law forbidding the sponsoring bank to have branches in the market of the sponsored bank. There is no reason to speculate about the legality of the relationship between C&S and the five per cent banks. That issue was resolved in *Independent Bankers Association of Georgia v. Dunn*, 230 Ga. 345, 197 S.E.2d 129 (1973), and in the subsequent order of the Commissioner of Banking and Finance (75a-87a). The district court found that the changes in the relationships between C&S and the five percent banks required by the Commissioner's order did not change its findings with respect to the fundamental character of those relationships (J.S. 70a-72a).

[20] In *Marine* the government suggested that the acquiring bank obtain a 25 percent stock interest in the sponsored bank (see Brief for the United States, p. 24), with the remainder to be owned by officers, directors, and associates of the sponsoring bank (see *id.* at 16). Under the theory that the government is advancing in the Jurisdictional Statement in this case, if those banks had not competed with each other this would be attributed to an unlawful agreement by the sponsored bank to become a "vassal" of its sponsor, an "agreement" inferred from their interlocking relationship.

> The . . . selling institution . . . was organized in 1965 under the guidance of the applicant bank . . . Until two years ago, excessive loan loss was a serious problem, but with the applicant bank management virtually taking over all the affairs of the selling bank, this problem has now been solved. Decisions of consequence are presently made by the applicant bank's management. The proposed acquisition will have little if any effect on competition between the two banks . . . [T]he Columbia and Yakima Rivers offer a natural physical barrier to competitive interaction. A more important consideration is the present ties that exist between the management of the purchasing and selling banks. This has served to limit the effective competition between the two institutions. [App. 1294.] . . . Other Bank has been operated more like a branch of applicant than as an independent bank. [App. 1297.]
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> In 1964, during the organizational state, First received the assistance of Old National, which continues to serve as its principal correspondent and has provided a chief executive officer since about 60 days after that bank began operations . . . Due to the distance separating the offices of the subject banks, the correspondent, managerial, and other relationships existing between them, there appears to be little competition which will be eliminated by this proposal. [App. 1306.]
>
> Tri-Cities National Bank, a satellite of the purchasing bank, opened in 1961 to provide the purchasing bank with access to the Pasco area . . . Due to the interlocking relationship between the purchasing and selling banks, consummation of the purchase and assumption would not have the effect of eliminating significant competition. [App. 1315-16.]

As mentioned before, the complaint in the present case charged that C&S and the five percent banks violated the

Sherman Act by agreeing to establish "a close working relationship". Yet as the record in *Marine* shows, a close working relationship between sponsoring and sponsored bank is of the essence of the method of entering new markets by sponsorship in states where *de novo* branching is constrained. Indeed, the record in the present case shows that a sponsored bank cannot even obtain its charter unless the sponsoring bank assures the banking authorities of its willingness to extend the kinds of managerial assistance and backing that the government now deems conclusive evidence of a *per se* violation of the Sherman Act (J.S. 46a-49a; Tr. 520, 900-01, 818-20, 827).

The government is involved in a flagrant contradiction. Desiring to increase the number of competitors in local banking markets, it seeks to encourage *de novo* branching as an alternative to acquisitions. But state laws severely limit *de novo* branching, and this led the government in *Marine* to suggest the sponsorship-followed-by-eventual-acquisition method of bank expansion. This method is unfeasible if, as now contended by the government, the eventual acquisition of the sponsored by the sponsoring bank is forbidden by section 7 of the Clayton Act, and the failure of the two banks, due to their many close associations, to compete prior to the acquisition is a *per se* violation of section 1 of the Sherman Act. If these contentions were accepted, the result would be to stifle new entry into banking markets subject to restrictive state branch-banking laws.

V. **There Are Additional Grounds for Affirmance.**

There are several technical grounds on which the decision below can be supported, in addition to the factual grounds which we have already discussed. We sketch two of them[21] briefly here.

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[21] We reserve the right, should probable jurisdiction be noted, to argue that the challenged acquisitions were within the exemption for subsidiaries in section 7 of the Clayton Act (15 U.S.C. § 18).

(1) As an alternative ground for dismissing the section 1 count, the district court held that the relationship between C&S and the five percent banks was subject to the original exclusive jurisdiction of the Federal Reserve Board. In *Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 419 (1965), this Court held that proceedings before the Board were "the sole means by which questions as to the organization or operation of a new bank by a bank holding company may be tested." C&S is a bank holding company, and the relationship between it and the five percent banks[22] arose from, and has continued unchanged since, the chartering of the banks as five percent banks. The Board, which is broadly empowered to enforce the provisions of the Clayton and Bank Holding Company Acts (see 12 U.S.C. §§ 1842(a), 1844(b), 1844(c), and 15 U.S.C. § 21(c)), twice investigated this relationship and found no impropriety (J.S. 16a-20a, 27a), and the Department of Justice failed to seek judicial review of its finding; it is barred by *Whitney* from challenging the relationship in a different kind of proceeding.

(2). Three of the five percent relationships challenged in this case[23] came into being prior to the effective date of the Bank Holding Company Act of 1966 (July 1, 1966). Section 11(d) of that Act (12 U.S.C. § 1849 (d)) "grandfathers" acquisitions completed prior to that date. If the government is correct that the five percent banks agreed when they were formed to become the "vassals" of C&S, those agreements constituted acquisitions within the meaning of the grandfather provision.

We point out, finally, that even if the Court should note probable jurisdiction and eventually reverse the appeal below, it would not end this case. The district court has yet to pass

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[22] Except the Tucker bank.

[23] Including that with the Tucker bank.

on the defendants' convenience and needs defense (12 U.S.C. § 1828(c)(5)(B)). And the defendants would ask the district court to reopen the relevant market question, since it is plain that the geographical market was incorrectly defined under the standard announced (after the decision below) in *United States v. The Connecticut National Bank*, No. 73-767, June 26, 1974.[24]

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[24] In the *Connecticut* decision, this Court ruled that the government must produce evidence to show a realistic delineation of any local banking markets in which competition is alleged to be affected. The government cannot rely, without more, on standard metropolitan statistical areas or on political boundaries (slip opinion, pp. 13-14). The government also cannot argue, as it did in this case (Plaintiff's Post-Trial Brief, p. 6), that a geographic area need not be a banking market to qualify as a section of the country (see slip opinion, p. 16). The district court in this case accepted, for purposes of discussion only (J.S. 31a), the district court's delineation of market areas. The record shows, however, that the government failed to prove its alleged market areas as required by *Connecticut*. Even the government's expert witness testified that the market areas alleged by the government were too large to constitute actual banking markets (Tr. 472-74, 491-96, 500-01).

CONCLUSION

For the reasons stated above, the judgment of the district court should be affirmed.

Respectfully submitted,

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